IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN

THURSDAY, THE 9TH NOVEMBER 2006 / 18TH KARTHIKA 1928

CMA.No. 61 of 2003()

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(OS.900/1999 of II ADDL.M.C., ERNAKULAM)

( AS.96/2001 of VI ADDL.DISTRICT COURT, ERNAKULAM)

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APPELLANT: RESPONDENT/PLAINTIFF:

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C.K.SUDHA,W/O.ASOKAN A.N., ALACKAL HOUSE, THUTHIYOOR, ERNAKULAM DISTRICT.

BY ADV. SRI.B.RAMACHANDRAN
SRI.L.P.ARAVINDAKSHAN
SRI.K.VIJAYACHANDRA MENON

RESPONDENT: APPELLANT/DEFENDANT:

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V.K.GOPALAKRISHNAN, S/O.KUTTAN, VELUMMEMOOKIL HOUSE, EDAKATTUVAYAL P.O., ERNAKULAM DISTRICT.

BY ADV. SRI.T.P.VARGHESE
SRI.PHILIP T.VARGHESE
SRI.THOMAS T.VARGHESE

THIS CIVIL MISC. APPEAL HAVING BEEN FINALLY HEARD ON 09/11/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON C.M.P.NO.1417 OF 2003 IN C.M.A.NO. 61 OF 2003

DISMISSED.

9-11-2006. SD/- THOTTATHIL B. RADHAKRISHNAN, JUDGE.

- true copy-

P.S. To Judge.

**THOTTATHIL B. RADHAKRISHNAN, J.**

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C.M.A.No. 61 of 2003

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Dated this the 9th day of November, 2006.

**JUDGMENT**

This is an appeal against an order of remand. The plaintiff in a suit for recovery of money is the appellant. She sued the defendant alleging that he borrowed money from her and executed Exts.A1 to A3. The trial court believed the version of the plaintiff and noticed that the defendant, having admitted to have given to the plaintiff signed blank papers, ought to have proved his case. On the balance of probabilities, the trial court decided in favour of the plaintiff and granted a decree for recovery of money charged on the properties in relation to which Exts.A1 to A3 were executed.

2. Considering the first appeal by the defendant, the lower appellate court came to the conclusion that there was really no evidence to hold in favour of any mortgage and therefore, the charged decree was illegal. However, instead of sustaining the decree for recovery of money without charge, the lower appellate court

chose to remit the matter without entering any specific finding, but requiring the trial court to adjudicate on the veracity of Exts.A1 to A3.

3. Along with this appeal by the plaintiff, she applied to this Court for leave to amend the plant by deleting the relief seeking a charge on the properties. That was granted by this Court by order dated 17-3-2006 on I.A.No.615/2006. The plaintiff has carried out the amendment. Faced with the aforesaid situation, all that need be done is that the decree of the trial court could be restored without sustaining the charge granted over the properties. However, the learned counsel for the defendant points out that independent of Exts.A2 and A3, the lower appellate court had not appreciated the sustainability of the decree on the basis of Ext.A1 and the absence of such a consideration would result in miscarriage of justice to the defendant. Having regard to the parameters of an appeal against an order of remand as laid down, at least, by two decisions of this Court, it could well be possible for this Court to go into the facts, appreciate the evidence and finally

dispose of the lis in its entirety. But having regard to the decision of the Apex Court in **Narayanan v. Kumaran [(2004) 4 SCC 26]**, I deem it appropriate to remit the matter back to the lower appellate court with the direction that the first appeal will be considered denovo with the plaint as amended and adjudicating on the question as to whether the decree granted by the trial court on the basis of Ext.A1 is sustainable. I do so because, the power of remand regulated by Order 41 Rule 23 and Rule 23A of the CP Code has, obviously, been ignored by the lower appellate court in rendering the impugned order.

In the result, the impugned order of remand passed by the lower appellate court is set aside and it is directed that the first appeal shall be taken up, considered and disposed of in accordance with law, following the directions contained in this judgment. The parties will appear before the lower appellate court on the 5th of December, 2006.

**THOTTATHIL B. RADHAKRISHNAN,**
**JUDGE.**

**Sha/-**

**THOTTATHIL B. RADHAKRISHNAN, J.**

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C.M.A. 61 of 2003

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**JUDGMENT**

**Dated: 9th November, 2006.**